

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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(202) 693-7300
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DATE: August 3, 2000

CASE NO.: 2000-INA-111

In the Matter of:

JONATHAN E. SAMUELS
Employer,

on behalf of

DHANO RAMDIAL
Alien

Appearance: John J. Corbett, Esq.
New York, New York
For Employer

Certifying Officer: Dolores Dehaan
New York, New York

Before: Vittone, Burke and Wood
Administrative Law Judges

DECISION AND ORDER

Per Curiam This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of household cook.¹ The CO denied the application and Employer requested review pursuant to 20 C.F.R. §656.26.

¹ Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On June 3, 1997, the Employer, Jonathan E. Samuels ("Employer") filed an application for labor certification on behalf of the Alien, Dhano Ramdial ("Alien") to fill the position of "Household Cook." (AF 1). The CO issued a Notice of Findings ("NOF") on July 1, 1999, proposing to deny certification. (AF 38). Therein, the CO questioned, pursuant to 20 C.F.R. §656.20(c)(8), whether the job opportunity was clearly open to U.S. workers. Finding that the application contained insufficient information to determine whether the position of Domestic Cook actually existed in Employer's household or whether the job was being created solely for the purpose of qualifying the alien as a skilled worker under current immigration law, Employer was directed to submit rebuttal which, at a minimum, had to include responses to the twelve questions raised in the NOF. The CO's questions included a request for documentation regarding past performance of the duties: the number of meals prepared weekly and the amount of time required to prepare each meal; an entertainment schedule for the past twelve month period, with a list of dates of entertainment, number of guests entertained and the number of meals served; the schedule of pre-school or school age children including who cares for them; the work schedules of the adults in the household; information as to who will perform the household work and who performed it in the past; the percentage of Employer's disposable income which will be devoted to paying the Alien's salary, the response to which must include a copy of Employer's Federal income tax return for the immediately preceding calendar year; information regarding whether the household has ever before employed a domestic cook; information regarding Alien's training and experience and what Alien's duties were when first hired and how Alien learned of the job offer. Employer was further advised that the adequacy of his documentation would be key to the evaluation of his application "because little weight will be accorded to conclusory statements." Employer was also advised that he could amend the requirements and advertise again.

Employer submitted rebuttal dated July 28, 1999. (AF 43). Employer explained that his is a family of five, and a baby sitter would be provided for the children at those times when he and his wife were unable to care for them. General household maintenance duties would be performed by others, and would not be required of the cook. Employer set forth the hours the live-out cook would work, and stated that the worker would not be required to perform duties other than that of a full time cook. Employer stated that Alien was not currently employed by him and that she had had two years of experience as a cook in a household in Trinidad. No familial relationship existed between them.

The CO issued the Final Determination ("FD") on September 15, 1999, denying certification. (AF 49). Therein, the CO determined that Employer's rebuttal failed to address many of the key questions asked, and failed to include the requested supporting documentation as well. Due to Employer's failure to address all the questions raised in the NOF, responses to which were necessary to determine whether a bona fide Domestic Cook position existed within the household, certification was denied.

On October 18, 1999, Employer filed a Request for Review. (AF 51).

DISCUSSION

In his Request for Review, Employer's counsel states that Employer was incorporating by reference his Response to the NOF, and would be submitting a brief at a later date. (AF 52) No brief has been submitted.

The issue of establishing that a bona fide position existed with regard to a domestic cook position was recently elaborated upon in *Carlos Uy III*, 1997-INA-304 (March 3, 1999 (*en banc*)). In that case it was held that

when an Employer presents a labor certification application for a "Domestic Cook," attention immediately focuses on whether the application presents a bona fide job opportunity because common experience suggests that few households retain an employee whose only duties are to cook, or could even afford the luxury of retaining such an employee. The DOT contemplates that a domestic cook is a skilled, professional cook, and would be able to cook sophisticated meals, as illustrated by the much higher experience requirement. Thus, such an application raises the question of whether the Employer is really seeking a housekeeper, nanny or companion or other general household worker, or is attempting to create a job for the purpose of assisting the alien in immigrating to the United States. One motive for categorizing a job as a domestic cook rather than as another type of domestic worker is to avoid the long wait for a visa for an unskilled laborer under IMMACT 1990.² If a labor certification application mischaracterizes the position offered, the job is not clearly open to U.S. workers in violation of section 656.20(c)(8), because the test of the labor market will be for higher-skilled domestic cooks rather than lower-skilled domestic positions that include cooking duties.

The burden of proving that Employer is offering a bona fide job opportunity is on him. *Gerata Systems America, Inc.*, 1988-INA-344 (Dec. 16, 1988)(*en banc*). Furthermore, it is Employer's burden at rebuttal to perfect a record that is sufficient to establish that a certification should be allowed. In the instant case, Employer was advised of the specific documentation needed to rebut the NOF, including copies of his Federal income tax return for the prior year, information regarding special dietary circumstances of the household, whether there were other domestic workers employed in the

²The Immigration Act of 1990 (IMMACT 1990) reduced the number of immigrant visas available to unskilled alien workers (aliens granted labor certification in occupations requiring less than two years of experience.) The visa waiting period for aliens in the unskilled category now exceeds five years, while visas for skilled alien workers (aliens granted labor certification in occupations requiring at least two years of experience) are currently available without a waiting period.

household, whether the household had ever employed a domestic cook in the past, the work and school schedules of the family members and Employer's entertainment schedule for the past twelve months. (AF 37-38). None of this information was provided by Employer, despite the NOF's clear directive that such documentation was critical.

Where the CO requests documentation or information which has a direct bearing on the resolution of the issue and is obtainable by reasonable effort, the Employer must produce it. *Gencorp*, 1987-INA-659 (Jan. 13, 1988)(en banc). An Employer's failure to produce documentation reasonably requested by the CO will result in a denial of labor certification. *John Hancock Financial Services*, 1991-INA-131 (June 4, 1992); *Rocco Parente*, 1992-INA-248 (Aug. 2, 1993).

Employer's rebuttal consisted of bare assertions, and broad statements regarding the duties of the position at issue and how his household is run. He provided none of the documentation requested to support those assertions. His rebuttal, therefore, cannot carry his burden of proof. *See Neil Clark*, 1995-INA-92 (Jan. 27, 1997). Accordingly, we find that the CO's denial of labor certification was proper.

ORDER

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

Entered at the direction of panel:

Todd R. Smyth, Secretary to the Board
of Alien Labor Certification Appeals

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.